

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONNIE HANDEL,
Plaintiff,

vs.

CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,
Defendant.

No. CV-12-359-LRS

**ORDER GRANTING
DEFENDANT'S MOTION FOR
REMAND, *INTER ALIA***

BEFORE THE COURT are Plaintiff's Motion For Summary Judgment (ECF No. 16) and the Defendant's Motion For Remand (ECF No. 25).

JURISDICTION

Connie Handel, Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on February 14, 2008. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing and one was held on September 16, 2010, before Administrative Law Judge (ALJ) Marie Palachuk. Plaintiff, represented by counsel, appeared and testified at this hearing. Arthur Lorber, M.D., and Margaret R. Moore, Ph.D. testified as Medical Experts (MEs). Deborah Lapoint testified as a Vocational Expert (VE). On October 8, 2010, the ALJ issued a decision denying benefits. The Appeals Council denied a request for review and the ALJ's decision became the final decision of the Commissioner. This decision is appealable to

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1 district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

2
3 **STATEMENT OF FACTS**

4 The facts have been presented in the administrative transcript, the ALJ's
5 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.
6 At the time of the administrative hearing, Plaintiff was 35 years old. She has a
7 high school education, and past relevant work experience as a veterinary
8 technician, nursing home cook, hotel clerk, cashier, and waitress/cocktail
9 server/bartender. Plaintiff alleges disability since May 1, 2007, due to a
10 combination of physical and mental impairments.

11
12 **STANDARD OF REVIEW**

13 "The [Commissioner's] determination that a claimant is not disabled will be
14 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*
15 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a
16 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975),
17 but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th
18 Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573,
19 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might
20 accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389,
21 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the
22 [Commissioner] may reasonably draw from the evidence" will also be upheld.
23 *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348
24 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a
25 whole, not just the evidence supporting the decision of the Commissioner.
26 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Thompson v. Schweiker*, 665
27 F.2d 936, 939 (9th Cir. 1982).

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1 It is the role of the trier of fact, not this court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
3 rational interpretation, the court must uphold the decision of the ALJ. *Allen v.*
4 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

5 A decision supported by substantial evidence will still be set aside if the
6 proper legal standards were not applied in weighing the evidence and making the
7 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433
8 (9th Cir. 1987).

9 10 ISSUES

11 Plaintiff argues the ALJ erred by: 1) failing to acknowledge that she
12 credited certain evidence which established Plaintiff's disability and which
13 resulted in the Commissioner not meeting her Step Five burden; 2) improperly
14 rejecting the opinions of Plaintiff's treating and examining physicians; and 3)
15 improperly rejecting Plaintiff's credibility as to her subjective complaints.

16 17 DISCUSSION

18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act defines "disability" as the "inability to engage in
20 any substantial gainful activity by reason of any medically determinable physical
21 or mental impairment which can be expected to result in death or which has lasted
22 or can be expected to last for a continuous period of not less than twelve months."
23 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). The Act also provides that a
24 claimant shall be determined to be under a disability only if her impairments are of
25 such severity that the claimant is not only unable to do her previous work but
26 cannot, considering her age, education and work experiences, engage in any other
27 substantial gainful work which exists in the national economy. *Id.*

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1 The Commissioner has established a five-step sequential evaluation process
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
3 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one
4 determines if she is engaged in substantial gainful activities. If she is, benefits are
5 denied. 20 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the
6 decision-maker proceeds to step two, which determines whether the claimant has a
7 medically severe impairment or combination of impairments. 20 C.F.R. §§
8 404.1520(a)(4)(ii) and 416.920(a)(4)(ii). If the claimant does not have a severe
9 impairment or combination of impairments, the disability claim is denied. If the
10 impairment is severe, the evaluation proceeds to the third step, which compares
11 the claimant's impairment with a number of listed impairments acknowledged by
12 the Commissioner to be so severe as to preclude substantial gainful activity. 20
13 C.F.R. §§ 404.1520(a)(4)(iii) and 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P,
14 App. 1. If the impairment meets or equals one of the listed impairments, the
15 claimant is conclusively presumed to be disabled. If the impairment is not one
16 conclusively presumed to be disabling, the evaluation proceeds to the fourth step
17 which determines whether the impairment prevents the claimant from performing
18 work she has performed in the past. If the claimant is able to perform her previous
19 work, she is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv) and 416.920(a)(4)(iv).
20 If the claimant cannot perform this work, the fifth and final step in the process
21 determines whether she is able to perform other work in the national economy in
22 view of her age, education and work experience. 20 C.F.R. §§ 404.1520(a)(4)(v)
23 and 416.920(a)(4)(v).

24 The initial burden of proof rests upon the claimant to establish a prima facie
25 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
26 (9th Cir. 1971). The initial burden is met once a claimant establishes that a
27 physical or mental impairment prevents her from engaging in her previous
28 occupation. The burden then shifts to the Commissioner to show (1) that the

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1 claimant can perform other substantial gainful activity and (2) that a "significant
2 number of jobs exist in the national economy" which claimant can perform. *Kail*
3 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

4 The Contract with America Advancement Act of 1996 (CAAA) amended
5 the Social Security Act, providing that "an individual shall not be considered to be
6 disabled . . . if alcoholism or drug addiction would . . . be a contributing factor
7 material to the Commissioner's determination that the individual is disabled." 42
8 U.S.C. § 423(d)(2)(C). Special statutes and regulations govern disability claims
9 that involve substance abuse. The ALJ must follow a specific analysis that
10 incorporates the sequential evaluation discussed above. 20 C.F.R. §§ 404.1535(a),
11 416.935(a). The ALJ must first conduct the five-step inquiry without attempting
12 to determine the impact of a substance abuse disorder. If the ALJ finds that the
13 claimant is not disabled under the five-step inquiry, the claimant is not entitled to
14 benefits, and there is no need to proceed with further analysis. *Id.* If the ALJ
15 finds the claimant disabled, and there is evidence of substance abuse, the ALJ
16 should proceed under the sequential evaluation and §§ 404.1535 or 416.935 to
17 determine if the claimant would still be disabled absent the substance abuse.
18 *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If found disabled
19 with the effects of substance abuse, the claimant has the burden in steps one
20 through four of the second sequential evaluation process to prove drug or alcohol
21 abuse is not a contributing factor material to her disability. *Parra v. Astrue*, 481
22 F.3d 742, 748 (9th Cir. 2007).

23 24 **ALJ'S FINDINGS**

25 The ALJ found the following: 1) Plaintiff has severe impairments which
26 include left femoral fracture status post open reduction internal fixation (ORIF) in
27 2004, chronic mid and low back pain with minimal findings on MRI, asthma
28 which is generally controlled, fibromyalgia diagnosis without accompanying

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1 clinical findings, mathematics disorder, history of attention deficit hyperactivity
2 disorder, depressive disorder, anxiety not otherwise specified, and borderline
3 personality disorder with paranoid and dependent features; 2) Plaintiff does not
4 have an impairment or combination of impairments that meets or equals any of the
5 impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff has the
6 residual functional capacity (RFC) to perform light work, can occasionally climb
7 ladders, ropes and scaffolds, should avoid concentrated exposure to temperature
8 extremes, should avoid even moderate exposure to respiratory irritants, such as
9 fumes, odors, and gases, has sufficient attention and concentration to understand,
10 remember, and carry out simple, routine, and repetitive tasks involving up to three
11 steps, and would work best away from the general public with only superficial
12 contact with coworkers; 4) Plaintiff's RFC prevents her from performing her past
13 relevant work; and 5) Plaintiff's RFC allows her to perform jobs that exist in
14 significant numbers in the national economy, including production assembler and
15 price marker in a retail setting. Accordingly, the ALJ concluded the Plaintiff is
16 not disabled.

17 18 **REMAND**

19 At the hearing, Medical Expert Dr. Moore was asked by the ALJ to offer an
20 opinion about Plaintiff's functional limitations arising from her mental
21 impairments. Dr. Moore testified there was a "mild" restriction on Plaintiff's daily
22 living activities; a "marked" restriction on her social functioning; a "mild" to
23 "moderate" restriction on her maintaining concentration, persistence and pace; and
24 no episodes of decompensation of extended duration. (Tr. at pp. 63; 345). Upon
25 questioning by Plaintiff's counsel, Dr. Moore elaborated upon her opinion
26 regarding Plaintiff's social functioning, opining that Plaintiff was "moderately"
27 limited in terms of working in coordination with or in proximity to others without
28 being distracted by them; "moderately" limited in terms of interacting with the

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1 general public; “markedly” limited in terms of accepting instructions and
2 responding appropriately to criticism from supervisors; and “moderately” to
3 “markedly” limited in her ability to get along with coworkers or peers without
4 distracting them or exhibiting behavioral extremes. (Tr. at pp. 66-67; 349-50).

5 The ALJ asked the VE to assume Plaintiff had the RFC that the ALJ
6 ultimately found the Plaintiff to have (and set forth above). Based on that RFC,
7 the VE opined that although Plaintiff was not capable of performing her past
8 relevant work, she was capable of performing certain other jobs existing in
9 significant numbers in the national economy. (Tr. at pp. 81-82). Plaintiff’s
10 counsel then asked the VE to assume Plaintiff was “markedly” limited in her
11 ability to accept instructions and to respond appropriately to criticism from
12 supervisors, to which the VE responded that this would preclude the jobs she
13 identified in response to the ALJ’s hypothetical, as well as any other jobs. (Tr. at
14 p. 85).

15 In her decision finding the Plaintiff not disabled, the ALJ fully credited the
16 opinions offered by Dr. Moore at the hearing regarding the extent of Plaintiff’s
17 functional limitations, including “marked difficulties in maintaining social
18 functioning,” “marked” limitations in the ability to work in coordination with or in
19 proximity to others without being distracted by them, “marked” limitations in the
20 ability to accept instructions and respond appropriately to criticism from
21 supervisors, and “moderate” to “marked” limitations in the ability to get along
22 with coworkers or peers without distracting them or exhibiting behavioral
23 extremes. (Tr. at pp. 32-33).

24 The Commissioner concedes the ALJ erred in crediting the opinions offered
25 by Dr. Moore, but failing to include them in her (the ALJ’s) RFC determination.
26 The Commissioner contends, however, this error does not require a finding of
27 disability and that instead, a remand for further proceedings is warranted. The
28 Commissioner contends there are outstanding issues that must be resolved before a

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1 determination of disability can be made, including whether substance abuse is a
2 contributing material factor. In response, Plaintiff contends there are no
3 unresolved DAA (Drug and Alcohol Abuse) issues in this case because the ALJ
4 did not make an explicit finding at Step Two that any of Plaintiff's severe mental
5 impairments were related to drug or alcohol abuse.

6 Under the process outlined in *Bustamante v. Massanari*, 262 F.3d 949, 955
7 (9th Cir. 2001), and recently explained in Social Security Ruling (SSR) 13-2p,
8 2013 WL 621536 (Feb. 20, 2013), in a case where there is DAA evidence, and
9 ALJ must consider all evidence at Step Two, including the evidence of DAA, to
10 determine the severity of the claimant's impairments. If the claimant's
11 impairments are disabling with DAA included, and substance abuse disorder is not
12 the only severe impairment, then the ALJ must proceed through the sequential
13 evaluation process twice, first including DAA, and then second, separating out the
14 DAA. 2013 WL 621536 at * 7.¹ Although it is true the ALJ did not make an
15 explicit finding at Step Two that any of Plaintiff's severe mental impairments were
16 related to drug or alcohol abuse, consideration of DAA is arguably implicit in the
17 ALJ's discussion of the medical evidence in her decision and, more importantly, it
18 was clearly a consideration in Dr. Moore's discussion of the evidence.

19 Dr. Moore testified she questioned the diagnosis of a psychotic disorder
20 because during Plaintiff's intake at Central Washington Comprehensive Mental
21 Health (CWCMMH) on January 28, 2008, she was very agitated and had some
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23 ¹ An ALJ is only compelled to engage in a DAA analysis if he finds the
24 claimant disabled. *Bustamante*, 262 F.3d at 955, citing *Drapeau v. Massanari*,
25 255 F.3d 1211, 1214 (10th Cir. 2001). In other words, if the ALJ concludes the
26 claimant is not disabled, even with DAA taken into account, then the claimant is
27 not entitled to benefits and the ALJ need not go through the sequential evaluation
28 process a second time under 20 C.F.R. §§ 404.1535 or 416.935.

1 “unusual perceptual thoughts” which “certainly may” have indicated a drug
 2 problem. (Tr. at p. 58). And then, Dr. Moore testified at length about “the final
 3 listing involved in the record,” that being “12.09” which is “Substance Addiction
 4 Disorders.” (Tr. at p. 61). Dr. Moore noted two things here: 1) the Plaintiff’s use
 5 of benzodiazepines and other medications for anxiety “which just seems to be
 6 something that she gravitates towards and asks for more of,” (Tr. at p. 61); and 2)
 7 the Plaintiff’s use of marijuana and her obtaining of a medical marijuana
 8 certification. With regard to the latter, Dr. Moore expressed concern about the
 9 Plaintiff not always being forthcoming about her usage of marijuana. (Tr. at p.
 10 62). Dr. Moore also expressed concern that Plaintiff’s medical providers were not
 11 “on the same page” about her marijuana usage and there “being no control once
 12 that letter [medical marijuana certification] is in place.” (Tr. at p. 62). Dr. Moore
 13 ultimately opined that “the role of substances is a bit clear.” (Tr. at p. 62).
 14 Plaintiff’s counsel challenged Dr. Moore about this on cross-examination, but she
 15 did not change her stance, even though she acknowledged she was familiar with a
 16 March 2008 evaluation during which Plaintiff tested negative for drug use and the
 17 Community Counseling Clinic concluded its assessment did not support a
 18 diagnosis of substance abuse or dependency. (Tr. at p. 65; pp. 605-07).
 19 According to Dr. Moore:

20 [T]he reason that I brought up the whole issue of substance
 21 abuse when I was doing my initial discussion of the various
 22 listings and the associated diagnoses is that I said that . . .
 23 there had been a brief intake interview [in January 2008]
 24 that had led to the rule-out and a . . . psychosis NOS [diagnosis].²
 25 And my point at that particular moment and in the narrative
 26 discussion was when this diagnosis was made there was some
 27 evidence of a substance abuse problem. And I noted it, but I
 28 also noted that that particular . . . cluster was not continued
 as the record unfolded.

(Tr. at p. 66). More specifically, when Plaintiff was seen at CWCMH for a

² “NOS” means “Not Otherwise Specified.”

1 psychiatric evaluation on February 26, 2008, there was no longer a diagnosis of a
2 psychotic disorder “or anything of that sort,” (Tr. at pp. 65-66; 285-87), unlike
3 there had been at the January 28, 2008 intake assessment (Tr. at pp. 288-95).³

4 Dr. Moore also noted that during Plaintiff’s January 28, 2008 intake
5 assessment at CWCMH, the Plaintiff indicated she had undergone a chemical
6 dependency evaluation at “Dependency Health Services,” had been instructed to
7 enter an outpatient treatment program, and then came to CWCMH seeking “a
8 second opinion.” (Tr. at p. 290). According to Dr. Moore, “I don’t think they
9 would have recommended treatment if they hadn’t seen something.” (Tr. at pp.
10 64-65).

11 The ALJ’s apparent failure to consider the possibility of a DAA analysis in
12 light of Dr. Moore’s testimony is as inexplicable as her failure to consider Dr.
13 Moore’s opinion regarding the functional limitations arising from Plaintiff’s
14 mental impairments. It is made even more inexplicable by the fact the ALJ
15 specifically mentioned Plaintiff’s marijuana use as part of her credibility analysis
16 and found Plaintiff had “made inconsistent statement regarding her substance
17 use.” (Tr. at p. 35).

18 This case bears considerable resemblance to the situation presented in a
19 recent decision out of the District of Colorado where a remand was ordered
20 directing the ALJ to state on the record whether a DAA analysis was appropriate
21 and, if appropriate, to conduct such an analysis. *Deines v. Astrue*, 2012 WL
22 1018711 (D. Colo. 2012) at *6. According to the court in that case:

23 The ALJ did not state why he did not conduct such an analysis.
24 This also must be addressed on remand. As the Commissioner
25 notes, medical expert Dr. Houston testified at the hearing that
26 Plaintiff had a history of substance abuse. Plaintiff testified
27 that he had not abused drugs since 2004, but also testified

28 ³ The “Psychosis NOS” diagnosis is found at p. 293 of the Administrative
Transcript.

1 that he had used medical marijuana. The ALJ referenced
2 Plaintiff's use of drugs in connection with his credibility
analysis.

3 *Id.*

4 5 CONCLUSION

6 There is an outstanding issue here which requires resolution before a
7 disability determination can be made. Accordingly, a remand for further
8 proceedings is appropriate instead of a remand for payment of benefits. *Harman*
9 *v. Apfel*, 211 F.3d 1172, 1177-78 (9th Cir. 2000). On remand, the ALJ shall state
10 on the record whether a DAA analysis is appropriate, and if appropriate, shall
11 conduct said analysis. As one court noted:

12 [N]ot every mention of alcohol and/or drug usage in the medical
13 records requires a *Bustamante* analysis. There may be usage of such
14 substances that are so sporadic and light that their use would have not
15 more than a *de minimis* effect on the ability of a person to work,
16 i.e., their use would not even be a severe impairment. If such is the
17 case, . . . the analysis proceed without further mention of the alcohol
and/or drug usage. On the other hand, where the record so strongly
intimates that the substance usage would have more than *de minimis*
effect, that usage cannot simply be glossed over because its
analysis is too cumbersome, or otherwise too difficult, or not
presently preferred social policy. Controlling statutes and expressed
Congressional intent are not to be ignored for whatever reason.

18 *McClary v. Astrue*, 2012 WL 3648011 (E.D. Cal. 2012) at *2. Because of the
19 controlling statutes and Congressional intent, the *McClary* court raised the DAA
20 issue *sua sponte* and ordered a remand. 2012 WL 2921352 (E.D. Cal. 2012) at *8.
21 This also occurred in *Brown v. Astrue*, 2010 WL 4876591 (E.D. Cal. 2010) at *7,
22 in which the court noted that “where Congress has clearly spoken of its intent in

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1 this area, and mandated a preclusion of disability benefits if a disabling
2 impairment bears a connection with drug usage.”⁴

3 Defendant's Motion For Remand (ECF No. 25) is **GRANTED**. Plaintiff's
4 Motion For Summary Judgment (ECF No. 16) is **GRANTED** to the extent it seeks
5 a remand for additional proceedings. It is **DENIED** to the extent it seeks a remand
6 for an immediate award of benefits. Pursuant to Sentence Four of 42 U.S.C.
7 §405(g), this matter is **REMANDED** to the Commissioner for additional
8 proceedings and/or findings consistent with this order. An application for attorney
9 fees may be filed by separate motion.

10 **IT IS SO ORDERED.** The District Executive shall enter judgment
11 accordingly and forward copies of the judgment and this order to counsel.

12 **DATED** this 16th of October, 2013.

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14 *s/Lonny R. Suko*

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LONNY R. SUKO
United States District Judge

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⁴ The court expresses no opinion regarding the propriety of a remand for the
24 other issues identified by the Commissioner. The Plaintiff's position on these
25 other issues, as expressed in her reply memorandum (ECF No. 26), and her
26 assertions of error contained in her motion for summary judgment (ECF No. 16),
27 are preserved for future resolution on a second appeal to this court, should such
28 resolution be necessary.

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